BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KATHRYN D. PANTER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,013,059
WESTAR ENERGY, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant requests review of the November 17, 2003 preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.

ISSUES

The ALJ found claimant's injury arose from the normal activities of day-to-day living and, therefore, she was not entitled to benefits under the Act based upon the provisions of K.S.A. 2002 Supp. 44-508(e).

The claimant requests review of this determination and contends the ALJ erred. Claimant contends claimant suffered a traumatic injury on September 18, 2003, when, as she was walking from her car into her place of employment, her right knee gave out causing her to fall to the ground and twist her left knee.

Respondent argues this injury is not compensable pursuant to the provisions of K.S.A. 2002 Supp. 44-508(e), which precludes benefits for any injuries that occur as a result of the normal activities of day-to-day living.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

On September 18, 2003, claimant was walking in respondent's parking lot towards the building where she worked. As she was walking, she "stepped off to the left, and turned left with my left knee - - leg, and that is when the right knee went out."[1] She fell to the ground but caught herself with her hands. One of her coworkers came to her aid and helped her up, gathering her personal belongings, and she proceeded on into work.

[1] P.H. Trans. at 7.

Claimant began her work duties, but after a few hours, she was limping. Eventually, she was unable to pick herself up out of her chair because her right knee would not bend. She notified her supervisor, and her supervisor referred her to an occupational facility for treatment. Claimant was given crutches and scheduled to have an MRI on the following Friday, September 19, 2003.

On the morning of the 19th, claimant discovered her left knee was "not working."[2] She informed the treating physician of her additional complaints and she additionally sought treatment from her own personal physician, Lorraine O. Alvarado, M.D. Dr. Alvarado had treated claimant back in 1998 for degenerative arthritis in both her knees. In fact, claimant had undergone arthroscopic surgery on both knees and had been told that a bilateral knee replacement was likely in her future. She was prescribed Vioxx for her arthritic complaints and continued, rather uneventfully, until her accident in respondent's parking lot.

Although it is unclear from the record, it appears that respondent refused to provide any further treatment for claimant's condition, taking the position that K.S.A. 2002 Supp. 44-508(e) prohibits coverage under the Act.[3]

For a claim to be compensable, claimant must establish personal injury by accident arising out of and in the course of employment.[4] For a claim to arise "out of" employment, its cause or origin must develop out of the nature, conditions, obligations and incidents of employment.[5] In workers' compensation proceedings, the claimant bears the burden of proof to establish her claim. "Burden of proof" is defined in K.S.A. 2002 Supp. 44-508(g) as:

> [T]he burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

The burden of proof is:

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[2] P.H. Trans. at 11.

[3] Initially, it appeared that respondent may have argued that claimant's accident occurred while she was on the way to work and as a result, was not compensable by virtue of K.S.A. 2002 Supp. 44-508(f). At the preliminary hearing, respondent conceded the accident occurred on respondent's premises and that the "going and coming" rule was inapplicable.

[4] K.S.A. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995); *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 197, 689 P.2d 837 (1984).

> [O]n the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.[6]

It is not always necessary for an injury to be caused by trauma or some form of physical force before it can be found compensable.[7] However, when an injury is attributable to a personal condition of the employee and no other factors contribute to the injury, the injury is not compensable.[8]

In 1993, the Kansas Legislature amended K.S.A. 44-508(e) to provide:

> An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.[9]

In this instance, the ALJ concluded:

> The facts and circumstances surrounding Claimant's fall and injury do not remove it from the normal activities of day-to-day living. Pursuant to K.S.A. 44-508(e), the Court finds that Claimant's injury did not arrive [*sic*] out of and in the course of her employment with Respondent.[10]

The Board agrees with the ALJ's conclusion.

The facts and circumstances surrounding claimant's injury do not remove it from "the normal activities of day-to-day living." Claimant did not slip or trip on anything in respondent's parking lot, nor was there anything about her work activities that led to her fall on September 18, 2003. While it is true that K.S.A. 2002 Supp. 44-508(e) does not exclude "accidents" but rather excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living,[11] simply sustaining an

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[6] K.S.A. 44-501(a).

[7] *See Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[8] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992); *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

[9] K.S.A. 44-508(e) (Furse 1993).

[10] Order at 1.

[11] *Corbett v. Schwan's Sales Enterprises*, No. 216,787, 1998 WL 304287 (Kan. WCAB May 26, 1998).

idiopathic fall in respondent's parking lot and injuring one or both of her knees does not entitle claimant to benefits. Her accident and the resulting disability, if any, must have arisen out of and in the course of her employment with respondent.

Based upon the record as it currently exists, the Board finds claimant has not met her burden of proving that she sustained personal injury by accident arising out of her employment. This determination is not binding in a full hearing on the claim and is subject to a full presentation of the facts.[12]

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated November 17, 2003, is hereby affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2003.

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BOARD MEMBER

c: Stephen J. Jones, Attorney for Claimant
Roger E. McClellan, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director

[12] K.S.A. 44-534a(a)(2).